

1930

TORONTO ADMIRALTY DISTRICT

May 31.
Oct. 24.
Nov. 5.

JOHN NICHOLSON, JR., AND PETER }
J. SHAW } PLAINTIFFS;

AND

THE SHIP "JOYLAND" DEFENDANT.

Shipping and Seamen—Marine Superintendent—Maritime Lien

Held, that services performed by a man engaged to superintend the installation of machinery in a ship, to have charge of all the operations of fitting out, purchasing supplies, and finding occupation for the ship, etc., do not create in his favour, a Maritime Lien.

His subsequent assumption of the duties of Master involving the navigation of the vessel would, if properly proven, create a Maritime Lien for his services during the period when he was engaged in carrying out his duties as Master.

ACTION brought by the plaintiffs, one claiming as Marine Superintendent, and the other as Master.

The Action was tried before The Honourable Mr. Justice Hodgins, Local Judge in Admiralty for the Toronto Admiralty District, at Toronto.

Loftus E. Dancey for plaintiffs.

J. Grayson Smith, K.C., for defendant.

The facts and questions of law raised are stated in the Reasons for Judgment.

HODGINS L.J.A., now (November 5, 1930), delivered judgment.

This action is by Jno. Nicholson suing as "Marine Superintendent" for \$20,408.54 for his "wages and disbursements" and by Shaw suing as Master for \$133 his wages and disbursements, \$40.75. The defendant ship is described as a self-propelling hydraulic dredge, and was arrested under a warrant in this action on the 4th March, 1929, at Burnt Island in Port Huron.

I need not pursue in detail the course of this vessel as the questions to be determined are largely legal in their character. The first is the claim of the plaintiff Nicholson for a maritime lien. He claims to have been appointed "Marine Superintendent" at a salary of \$10,000 per annum by his brother R. M. Nicholson in February, 1925. At the time of the contract the vessel was not purchased

and the plaintiff's duty was to buy a vessel (pursuant to which he bought the *Joyland*), to superintend its fitting up for the work of excavating and transporting gravel and then to find suitable deposits and customers to whom the gravel got from these deposits might be sold. In July, 1925, the Dominion Government prohibited the export of gravel and thereafter the plaintiff's work consisted largely of superintending repairs and making excursions to find suitable gravel. No business appears to have been done and only unsuccessful attempts made.

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The plaintiff signed no ships articles at any time and there were on board not only a Master (Shaw) but two or three engineers and a crew. When the plaintiff, Shaw, the Master of the Ship, left in December, 1925, his co-plaintiff says he navigated the ship in its peregrinations in search of gravel or between certain ports. In describing his duties throughout the plaintiff Nicholson explains that he was ordered on board as Marine Superintendent to instal machinery, that he had charge of all operations, superintended the machinery, hired and discharged the crew, purchased supplies, tested gravel and saw that "concrete aggregate" was made on board.

His position resembled closely that of a ship's husband or supercargo or both, with additional duties in seeing to the manufacture referred to being carried out on board. (See Maclachlan on Shipping, 6th Edition, p. 132.)

In this there is nothing giving a maritime lien on the vessel. There was a Master, the plaintiff Shaw, who is described in the log produced as Exhibit 3 as Master, so that the plaintiff's navigation of the ship must be subsequent to the Master leaving the ship. From the log produced and from the evidence it is far from clear that he had any status as Master because he contends that he was at all times marine superintendent and entitled to a salary of \$10,000 due by his brother, M. D. Nicholson, who in the witness box admitted this claim. The fact that he did navigate the ship in its ramblings round in search of gravel after the Master left in December, 1925, has of course to be considered.

No navigation except in tow of a tug is evident from the log during 1926. On May 31st, 1927, after installing ma-

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chinery to go to Duck Island, his services were dispensed with and he claims a month's notice.

Apart from this the ownership of and the dealings with the vessel indicate that such a claim as is made by the plaintiff is not sustainable as against the vessel at least before 1926. The registry is Montreal and the owners on 26th March, 1929 (see Exhibit 1), are shown to be the Maitland Sand and Gravel Co. subject to a mortgage.

The plaintiff's brother sold the vessel to this company on the 7th August, 1925, and yet the plaintiff does not claim against this company, with whom he does not appear to have had any contract, but rather asserts a claim on F. Wilson and Col. Hatch who with his brother M. D. Nicholson, according to him were financing the vessel and himself from March and April, 1925, down to March 10, 1927. Hatch gives evidence which is to the effect that the vessel was sold through the Sheriff at Detroit at his suit, to himself in the fall of 1926, and that early in 1927 he sold it to the Peerless Dredging Co., Ltd., whose secretary, Rosen, makes an affidavit on production in this action in which he asserts that his company is owner of the vessel. The appearance however is for the ship, not for the owners whoever they are.

Whether or not these transactions took place just as stated or whether sufficient proof of them has been given, they have nevertheless an important bearing on the plaintiff's rights. Up to the time Hatch bought in the autumn of 1926 from the Sheriff the relation of the plaintiff and the owners, the Maitland Co. was that the former was Marine Superintendent and on a salary owing by his brother as General Manager of the Company. No evidence is given showing any liability in the Maitland Co. but some suggestion is made that Wilson and Hatch assumed the brother's contract. I can find no sufficient evidence to warrant any such finding.

On Hatch's purchase, if his evidence is accepted, he became the sole owner, and while the plaintiff stoutly maintains that his salary ran on, I can find no agreement by Hatch to assume it on his own behalf as such owner. It was at the end of 1926 that M. D. Nicholson says he ceased to act as General Manager of the Maitland Co. This company, the plaintiff Nicholson says, was "interested" in the

ship till June, 1927, but if so, it does not seem to have displayed in a corporate capacity any signs of it. But if the brother or Hatch agreed, after Shaw left, that the plaintiff should navigate the ship and do other duties—an inference which I think I may draw—the vessel would be liable notwithstanding subsequent transfers, if any, to the extent of the disbursements made by him and to such salary as an Acting Master might demand.

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While I decline to accept the plaintiff Nicholson's evidence in many respects, I think I should deal with the facts of the case as they appear to me and give him whatever rights appear to arise thereout. And these rights seem to be such, owing to the meagre evidence given before me, as to require further elucidation. A copy for the log produced for the season of 1926 is as follows:

Season 1926.

- May 31/26. 6.30 p.m. Departed Port Huron for Marine City Dry dock to undergo repairs to Hull and New Smoke Stack. Tug *Victory* of Thompson Tug line, Pt. Huron, Mich.
- June 25/26. Full Marine Insurance of 100,000 placed on stmr. Port Risk by Romeyn and Co. Brokers at Toronto.
- July 3/26. Fitting out Stmr. *Joyland*. have full engine room crew, Capt. and mate engaged.
- Aug. 5/26. Discharged crews vessel waiting on orders.
- Nov. 6/26. Departed *Marine City* for Ojibway Ontario to lay up for winter. Tug *Sarnia City* of Sarnia towed vessel to destination.
 Departed *Marine City* 9.30 a.m., arrived Windsor Ont. 6 p.m.
- Nov. 15/26. Stmr. *Joyland* in Winter Berth. Steel Companys slip fully layed up and in charge of watchman.

Two ship carpenters working all winter reconditioning Str. *Joyland's* hull.

From this it would appear that the plaintiff Nicholson's duties may have begun on July 3, 1926, and therefrom as shipkeeper on board. As to 1927 there is very little evidence of value. The account filed by the plaintiff Nicholson indicates very little.

I think in the order I propose making I am perhaps erring on the side of generosity in view of the very extraordinary way in which he presented his case and his conception of legal liability.

I direct that it be referred to the Registrar of this Court in Toronto (1) to determine during what time from and after July 3, 1926, and in the year 1927 up to May 31 the plaintiff Nicholson was himself employed in navigating the

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defendant ship or in doing work properly appertaining to the position of Master or work properly done in the repair, fitting out or laying up of the defendant ship as Master up to May 31, 1927, and to report what is a proper sum due to him therefor, less payments made to him on account thereof by Hatch, Wilson, M. D. Nicholson or Rosen or by any one on their behalf or on the behalf of the Peerless Dredging Company.

(2) To take an account of his proper disbursements in regard to the foregoing work during the aforesaid period less such amounts as were received by said plaintiff on account thereof from Hatch, Wilson, M. D. Nicholson or Rosen, or from any one on their behalf or on behalf of the Peerless Dredging Company, and to report what sum was properly expended by the said plaintiff in regard to the foregoing work and what, if anything, still remains due to him over and above the moneys received by him as above or for which he is properly accountable.

In view of the exceedingly unsatisfactory evidence of the plaintiff Nicholson, and to the extraordinary claim made by him, the reference hereby directed must be taken at his own expense.

Judgment will be entered for the plaintiffs by the Registrar after the making of his report for a sale of the ship to satisfy the claim of the plaintiffs and such other claims as have been or are, after such notice, if any, as he deems necessary, filed with or proved before the Registrar at such sums as may be found by the Registrar in his report.

There will be no costs throughout owing to the great delay and confusion in the evidence as to the rights and actions of all the parties hereto, except that the plaintiffs may have the necessary costs of action up to and including the seizure of the ship.

I think Shaw as Master is entitled to judgment for his claim \$133.20 and \$40.75 for disbursements as the claim of both parties together is over \$200. I do not think R.S.C., 1927, c. 33, s. 22 (a) applies in this case as I am unable to find as a fact that there is any subsequent bona fide purchaser or mortgagee. Hatch who gave evidence is not proved to be either, nor is the Peerless Dredging Co. If the prior registered mortgage to the Aube Co. is valid and in

force, as to which I am not advised, both plaintiffs' claims will be subject to it and the Registrar will notify the mortgagee of the terms of this judgment.

There will be no interest on the claim of either plaintiff.

Judgment accordingly.

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